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Teo Sui Chin & Ors v Lim Siok Luan

B HIGH COURT (KUCHING) — CASE NO KCH-22NCvC-59/9 OF 2014
RHODZARIAH BUJANG J
11 JANUARY 2016

C *Land Law — Easements — Right of way — Whether plaintiffs' right of way over defendant's land had been affected by construction of concrete base fence on defendant's property — Whether plaintiffs were estopped by their conduct — Whether defendant allowed to maintain new fence*

D The plaintiffs and the defendant were at all material times the registered proprietors of adjoining parcels of land in Kuching. The land upon which the plaintiffs' house was built was right behind the land upon which the defendant's house was situated. It was only possible to access the plaintiffs' house and land through the defendant's land. Thus the plaintiffs were given an E easement or right of way over the defendant's land. That easement which was registered before the issuance of the title on 23 March 1996 consisted of an access road of a uniform width of 16 ft over the defendant's land and leading to the plaintiffs' land. The plaintiffs enjoyed the use of the access road until June 2014, when the defendant constructed a concrete base fence to replace the F former chain-link fence along her property, which had allegedly rendered the access road to be less than 16 ft wide, thereby depriving the plaintiffs of a right of way. The plaintiffs thus filed the present action by which they sought a declaration that the defendant had no right to build the concrete base fence, an order to remove the same and for damages to be assessed. In her defence the G defendant pleaded that the access road had been of the same width even though her property was now fenced up with a concrete base fence. The defendant also submitted that the plaintiffs had not complained when the construction of the concrete fence was in progress. As such, the defendant pleaded estoppel as a defence and alternatively the plaintiffs' waiver of their rights because the H plaintiffs or their predecessors had been aware of the construction of the access road when their two houses were constructed. The defendant also counterclaimed for, inter alia, a declaration that she be entitled to apply to the relevant authority to cancel the easement or alternatively a rectification to reflect the actual width of the access road.

I **Held,** dismissing the claim and counterclaim with each party to bear its own costs:

(1) The defendant's son had explained that the previous chain-link fence had attracted two break ins. These incidents of burglary coupled with the

news of a robbery cum murder that occurred in the same area had prompted the construction of the new fence by the defendant. Further, from the clear evidence of the photographic evidence it could be seen that the plaintiffs' gate was still directly aligned to the access road before the defendant's old chain-link fence was demolished. In other words, the fact that the said gate was still aligned directly to the same gate meant that the access to the house had not been seriously impeded by the new fencing of the defendant's house. This proved the defendant's defence that the construction of the new fencing did not narrow the existing width of the 48 years old access road (see para 6).

(2) An on-site inspection of the land revealed that if the plaintiffs wanted a bigger access road, they could have just concreted the useless drain running alongside it. In any case the plaintiffs were estopped by their own conduct from litigating their right to a 16 ft access road, with the conduct being waiver and delay to do so. In other words, their right to the 16 ft access road had lapsed by effluxion of time. Although the defendant had only pleaded estoppel and waiver as a defence it did not stop this court from also construing estoppel and waiver adversely against the plaintiffs' ie by the plaintiffs' indolent attitude towards the right of easement given to them in 1966 (see para 7).

(3) Further, there was no merit in the plaintiffs' submission that there was never an intention shown by them to waive the size of the access road and that the defendant had to show some positive act to abandon that right. There was no issue of the plaintiffs waiving their right to the access road but only as to whether they could after the lapse of all these years insist that the access road be 16 ft instead of they had used for all these years. In the circumstances the defendant would be allowed to maintain the new fence to her house (see para 12).

(4) The Registrar of Land and Survey Kuching, had herself testified that the easement could be extinguished if all parties agreed to it and if there was an alternative public access available. Clearly the defendant was at liberty to make the necessary application for the cancellation of the easement and did not require a declaration as she had prayed for in her counterclaim in order to make such an application (see para 14).

[Bahasa Malaysia summary

Plaintif dan defendan pada setiap masa material adalah pemilik berdaftar dua bidang tanah bersebelahan di Kuching. Tanah yang mana rumah plaintif dibina terletak di belakang tanah di mana terletaknya rumah defendan. Ia hanyalah mungkin untuk mengakses rumah dan tanah plaintif melalui tanah defendan. Maka plaintif telah diberikan satu easemen atau hak laluan atas tanah defendan. Easemen itu yang mana telah didaftarkan sebelum pengeluaran hakmilik pada 23 Mac 1996 terdiri daripada jalan masuk lebar

seragam 16 kaki atas tanah defendan dan menuju ke tanah plaintif. Plaintif menikmati penggunaan jalan masuk sehingga Jun 2014, apabila defendan membina pagar asas konkrit untuk menggantikan pagar rantai terdahulu di sepanjang hartanahnya, yang mana didakwa menyebabkan jalan masuk menjadi kurang daripada 16 kaki lebar, dengan itu menafikan plaintif hak laluan. Plaintif oleh itu, memfailkan tindakan ini yang mana mereka memohon deklarasi bahawa defendan tidak mempunyai hak untuk membina pagar asas konkrit, satu perintah untuk merobohkan yang sama dan untuk ganti rugi ditaksirkan. Dalam pembelaannya defendan memplidkan bahawa jalan masuk mempunyai kelebaran yang sama walaupun hartanahnya kini telah dipagari dengan pagar asas konkrit. Defendan juga mengemukakan bahawa plaintif tidak membuat aduan semasa pembinaan pagar konkrit sedang dalam proses. Dengan itu, defendan memplidkan estopel sebagai pembelaan dan secara alternatif plaintif mengetepikan hak-hak mereka kerana plaintif atau pendahulu mereka menyedari pembinaan jalan masuk apabila kedua-dua rumah mereka dibina. Defendan juga menuntut balas untuk, antara lain, satu deklarasi bahawa dia berhak untuk memohon kepada pihak berkenaan untuk membatalkan easemen atau secara alternatif satu pembetulan untuk menunjukkan lebar sebenar jalan masuk.

Diputuskan, menolak tuntutan dan tuntutan balas dengan setiap pihak menanggung kos sendiri:

(1) Anak lelaki defendan telah menjelaskan bahawa pagar rantai terdahulu telah menyebabkan dua pecah masuk. Kejadian pecah rumah ditambah pula dengan berita rompakan merangkap pembunuhan di kawasan yang sama telah mendorong pembinaan pagar baru oleh defendan. Selanjutnya, daripada keterangan nyata keterangan bergambar boleh dilihat bahawa pagar plaintif masih lagi sejajar ke jalan masuk sebelum pagar rantai lama defendan dirobohkan. Dalam perkataan lain, fakta bahawa pagar masih lagi sejajar kepada pagar yang sama bererti bahawa akses ke rumah itu tidak dihalang dengan teruk oleh pagar baru rumah defendan. Ini membuktikan pembelaan defendan bahawa pembinaan pagar baru tidak merapatkan lebar sedia ada jalan masuk yang berumur 48 tahun itu (lihat perenggan 6).

(2) Satu pemeriksaan tapak di atas tanah mendedahkan bahawa jika plaintif mahukan jalan masuk yang lebih besar, mereka boleh sahaja mengkonkritkan longkang yang tidak digunakan selari di tepinya. Walau bagaimanapun plaintif diestop dengan perilaku mereka sendiri daripada menuntut hak mereka untuk jalan masuk 16 kaki, dengan perilaku dikecualikan dan kelewatan untuk berbuat demikian. Dalam perkataan lain, hak mereka untuk jalan masuk 16 kaki telah luput dengan peluputan masa. Walaupun defendan hanya memplidkan estopel dan pengecualian sebagai pembelaan ia tidak menghentikan mahkamah daripada mentafsirkan estopel dan pengecualian buruk terhadap plaintif

iaitu oleh sikap lewa plaintif terhadap hak easemen yang diberikan kepada mereka pada tahun 1996 (lihat perenggan 7).

(3) Selanjutnya, tiada merit dalam hujahan plaintif bahawa tidak pernah terdapat niat ditunjukkan oleh mereka untuk mengecualikan saiz jalan masuk dan bahawa defendan hendaklah menunjukkan beberapa tindakan positif untuk meninggalkan hak itu. Tidak terdapat isu plaintif mengetepikan hak mereka kepada jalan masuk tetapi hanya kepada sama ada mereka boleh selepas selang beberapa tahun in menegaskan bahawa jalan masuk adalah 16 kaki seperti yang telah mereka gunakan selama ini. Dalam keadaan defendan dibenarkan untuk mengekalkan pagar baru mereka (lihat perenggan 12).

(4) Pendaftar Tanah dan Juruukur Kuching, sendiri telah memberi keterangan bahawa easemen itu boleh dibatalkan jika semua pihak bersetuju kepadanya dan jika terdapat akses awam alternatif. Ternyata defendan bebas untuk membuat permohonan yang diperlukan untuk pembatalan easemen dan tidak memerlukan satu deklarasi kerana dia telah memohon dalam tuntutan balasnya untuk membuat permohonan sebegitu (lihat perenggan 14).]

Notes

For cases on right of way, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3464–3494.

Cases referred to

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58, FC (refd)

Taat Yik Plantations Sdn Bhd v Pentadbir Tanah Hilir Perak & Ors [2001] 5 MLJ 736, HC (refd)

The State Government of Sarawak & Ors v Teo Soo Chuan [2014] 4 MLJ 114, CA (refd)

WJ Alan & Co Ltd v El Nasr Export & Import Co [1972] 2 All ER 127, CA (refd)

Legislation referred to

Land (Control of Sub-division) Ordinance (Cap 82)

Chong Siew Chiang (Carol Lua with him) (Chong Brothers Advocates) for the plaintiffs.

Chan Siew Yan (Ee & Lim Advocates) for the defendant.

Rhodzariah Bujang J:

[1] The plaintiffs and the defendant are registered proprietors of land adjoining each other. The first plaintiff is the mother of the third and fourth plaintiffs whilst the second plaintiff is her brother. Both the plaintiffs' and defendant's respective houses on the said parcels of land face a busy thoroughfare in Kuching, ie Green Road but that of the defendant is in front whilst the house on the plaintiffs' land is behind. The land upon which the plaintiffs' house No 155A is built is described as Lot 255 Section 18 Kuching Town Land District and that of the defendant, No 155 is on Lot 254. The titles to both land were issued on the same date ie *24 October 1966*. The defendant's husband acquired Lot 254 in 1991 and upon his death in 2012, the land was transferred to her. Lot 255 being right behind that of Lot 254, it was given an easement or right of way over Lot 254. That right of way was registered, before the issuance of the title on 23 March 1966, by a memorandum of endorsement of condition of survey plan approved under the Land (Control of Sub-division) Ordinance. That memorandum is endorsed on the land title for Lot 254 and it specifically provides as follows.

EASEMENT

[2] That an access road of an uniform width of 16 ft be registered as an easement right of way appurtenant to Lot 255 over Lot 254 Section 18 Kuching Town Land District.

[3] For years, said the plaintiffs, they have enjoyed the use of that access road, concreted no less until June 2014 when the defendant constructed a concrete base fence along their property which rendered the access road to be less than 16 ft, thereby depriving them of a right which they have enjoyed for decades. They have therefore filed this action to declare that the defendant has no right to build such a fence, to remove the same and for damages to be assessed.

[4] The defendant in her defence pleaded that the said access road or driveway as she called it has always been of the same width at the time when their property was fenced up with a chain-link fence until the present fence with its concrete base and iron rods was built. The residents of Lot 255 have been able to use the access road with no hindrance during and after the construction, did not complain when the construction of the concrete fence was in progress and which fence was constructed on their own land, she pleaded further. The defendant thus pleaded estoppel as a defence and alternatively waiver of their rights as the plaintiffs or the predecessors were aware of the construction of the access road by the developer when their two houses were constructed. In fact, pleaded the defendant the plaintiffs could

have an alternative access through another feeder road at the back of their house known as Cookes Drive and have therefore counterclaimed for, inter alia, a declaration that she be entitled to apply to the relevant authority to cancel the said easement or alternatively a rectification to reflect the actual width of the access road.

ACTUAL WIDTH

[5] In the midst of the trial, on 7 September 2015 @ 10.30am the parties, their counsels and I went for a site visit where measurements were taken of the gate to the plaintiffs' house and width of the access road. There are no two ways about it — the width of the access road is definitely less than 16 ft. In fact at the point alongside the access road where an electricity pole was erected it was less than 10 ft even. There is also a small concrete drain running alongside the access road which is obviously unused as the opening where effluents ought to be discharged is covered with concrete. An inkling of what this access road and the other features that I just described look like can be seen in the photographs tendered at the trial — that of the plaintiffs' which is at p 2 of exh P3 (the plaintiffs' supplementary bundle of documents) and that of the defendant marked as 5(A), 5(F), 9(A) and 9(B) of exh D2 (the defendant's supplementary bundle of documents). What can be seen from these photographic evidence and this is confirmed by a private land surveyor engaged by the plaintiffs ie Mr Patrick Yii Sze Heng ('PW2') and by Mr Lim Guan Sin ('PW3'), the first plaintiff's husband, is that the width of the plaintiffs' gate is the same as that of the driveway. That gate and the driveway agreed PW3 in his cross-examination were the same ones, constructed in *1968*. I could also clearly see for myself that the grass growing along the cracks of the cement screed right in front of the gate was also totally aligned with the gate and this can also be seen just as clearly in the first plaintiff's own photographic evidence at p 2 of exh P3. What the alignment proves is that the size of the gate has always been the same since its construction all that 48 years ago. The width of that gate, when measured at the scene is 10 ft 10 inches although PW3 in his evidence said it is 9 ft 4 inches and since he drove a Mercedes car which is about 8 ft in width, it was difficult for him to drive through the access road, he said in his cross-examination by Ms Chan Siew Yan for the defendant. When re-examined by Mr Chong Siew Chiang for the plaintiffs, the witness said after construction of the new fence by the defendant, his Mercedes could not go through the driveway. He further said that the concrete base for the new fence is 8 3/4 inches whereas that previously for the chain-link fencing was only three inches — a difference of 5 3/4 inches. In fact the measurement taken during the visit shows that the concrete base for the new fence was nine inches in width but 6 inches of it was in the defendant's land and only three inches of it on the driveway. In other words, the said base was wider inside the defendant's own land than it is on the driveway. During the visit as well and this is borne out by the photographs of the new gate and fencing of the defendant's exhibit ie photograph No 4 of exh

D2, photographs Nos 5(B) and 5(F) which I have mentioned earlier as well as 5E of the same exh D2, the new left concrete pillar of the defendant's gate was constructed at an angle which in a way facilitates the entry into the access road. I also noted that right in front of the defendant's house before its gate there is a bituminised space by the side of their fence ie that space is sandwiched between the said fence and Green Road. In other words, a vehicle which wants to turn into the access road need not do it straight from the road for it can ease itself into the space before making the left turn to the access road. I had used the said space, as did the defendant's counsel, to park our respective vehicles during the said visit.

THE FUTILITY OF THE CLAIM

[6] There is a famous old saying which goes like this: A picture paints a thousand words and it is on account of all the photographs I mentioned and the ones which I am about to mention now that I am moved to resolve the plaintiffs' claim in the defendant's favour. These other photographs are that of the access road and the defendant's old fencing and gate which were taken, said Marco Chin Van Min ('DW2'), the defendant's son when their chain-link fence were cut open, presumably by burglars and a break in occurred at their house sometime in 2013. That was the second break-in which, together with the news of a robbery cum murder also occurring in the same area of Green Road, prompted the construction of the new fence said both mother ('DW1') and son in their witness statements (WSDW1 and WSDW2 respectively). The relevant photographs are marked 2(A)–2(I) in exh D2. From the clear evidence of these photographs, I am able to see, particularly from photographs 2(C) that the plaintiffs' gate was still directly aligned to the access road before the defendant's old chain-link fence was demolished as it presently is which proves the defendant's defence that the construction of their new fencing does not narrow the existing width of that 48 years old access road.

[7] In saying this I acknowledge the fact, from photographs 2(G) and 2(H) that with the defendant's old gate and chain-link fencing, the turning into the access road was easier because the pillar of the defendant's old gate was just a small pole and not a concreted one with an added small concrete wall as it is now but it does not detract from the fact that the access road was of, if not almost, the same width as that previously. I could in fact see a solution if the plaintiffs wanted a bigger access road. They could just concrete the useless drain running alongside it and perhaps also install a mirror at the entrance of the access road which was normally done to cure a blind corner on roads — this to ensure that those turning in and going out of the access road could see any oncoming traffic. With respect, galvanising into action by litigating their right to a 16 ft access road after living with it for almost half a century is obviously not a solution for the plaintiffs are estopped by their own conduct — the conduct being waiver and delay to do so. In other words, their right to that 16 ft

driveway has lapsed by effluxion of time. In drawing this conclusion I am aware that the defendant have only pleaded estoppel and waiver as a defence but it does not stop me from also construing, adversely against the plaintiffs their indolent attitude towards the right given to them by that 1966 memorandum of a 16 ft right of way for I do not need a pleaded fact to move me to apply the often quoted principle in law that the court will not assist an indolent plaintiff who I may add was content to sleep on his rights and in this case by not just a few years but for almost half a century.

[8] Ms Chan Siew Yan in her written submission has an apt quotation from the judgment of Lord Denning MR in *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 on waiver and it is this:

> The principle of waiver is simply this: if one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them.

[9] She has also rightly submitted the Federal Court's case on estoppel ie that of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 where at p 346 thereof Gopal Sri Ram JCA also reproduced the quotation above and this other, also from Lord Denning but in *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 where His Lordship said as follow:

> When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. In one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[10] I too cannot ignore the fact admitted in the evidence of both PW3 and his son, the fourth plaintiff ('PW4') that in actual fact the plaintiffs do not reside at the said house on Lot 255 although they visited it occasionally. It was at the time of the trial occupied by a relative of theirs and her family who are not parties in this action but of course the fact of their non-residence have very little bearing to the viability of their action since as registered proprietors they have every right to institute it. Although I am also fully aware that unlike the defendant's husband who was the registered owner of Lot 254 since its title was issued and the defendant, after his death, but the plaintiffs only came to be registered co-proprietors of the land at different dates after various transfers

were effected from their original co-proprietors, Teo Ee Ping's and Teo Aik Kuong's half share each in the land. This I noted in the document of title for Lot 255 at pp 1–7 of exh P2 (the plaintiffs' bundle of documents). Nevertheless, knowledge of the size of access road cannot have escaped all of them because the first plaintiff's parents lived there. In fact, according to PW2, the first plaintiff's mother ie his mother-in-law passed away five years ago and in her lifetime, both the defendant and his late mother-in-law were in good terms with each other.

[11] Mr Chong Siew Chiang in his written submission defended his clients' silence over the width of the access road by saying that they were unaware of the rightful 16 ft width of it until the construction of the new fencing by the defendant. He cited the Federal Court's decision in *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58 where it was held that 'mere silence cannot operate as an estoppel unless it is established that there is a duty to speak or act. Then, deliberate silence or inaction becomes equivalent to a representation as much as if a representation had been made by express language or positive acts'. With respect such self-professed ignorance (or silence) about the width of the access road could not be a factor in their favour when it is shown by the plaintiffs' own evidence from the land title to Lot 255 at p 5 of exh P2 that the transfer of shares in the land to second to fourth plaintiffs was all done on 18 May 2006 and the easement and its width of 16 ft is boldly printed on the land title. Although the first plaintiff's share was only transferred to her according to the same p 5 in *2012*, but as I said earlier that house on Lot 255 was her parents and the second to fourth plaintiffs are her children/brother. So I ask myself this rhetorical question: how could I possibly condone their, as I described earlier, self-professed ignorance of the width of the easement in the face of such stark evidence?

[12] In answer to Mr Chong Siew Chiang's assertion that there was never an intention shown by his clients to waive the size of the access road and that the defendant must show some positive act to abandon that right, again with respect, there is no issue of the plaintiffs waiving their right to that access road — only whether they could after the lapse of all these years insist that it be 16 ft instead of what they have lived with or rather used to all these years. In saying this I am aware that the plaintiffs did not build that access road and I must add, neither did the defendant but the plaintiffs' predecessors-in-title did. However, upon the second to fourth plaintiffs' acquisition of the shares in the land in 2006, they did nothing in a reasonable time thereafter to insist that the access road be 16 ft although they claimed that they had no problem with it before the defendant's new fencing. Nonetheless, the evidence which I have mentioned much earlier in this judgment shows and I reiterate that the access road was then and now still aligned to the gate of their house. The fact that the gate has remained the same shows that the access to the plaintiffs' house — either by

humans or vehicles have not changed with the new fencing of the defendant's house. In other words, the fact that the said gate is still aligned directly to the same gate means the access to the house have not be seriously impeded by the new fencing of the defendant's house. Thus, even if the access road had been narrowed by the defendant's new concrete fencing, the narrowing cannot be more than 1 ft and as I had, with respect suggested earlier and if I may repeat the remedy, the useless drain along the access road could be cemented over to account for that lost space. Perhaps it is opportune that I explain myself further on the repeated labelling of that drain as 'useless'. It is an undisputed evidence at the trial that the waste water from the plaintiffs' house actually flows to a drain on the right side of the house (if one were to stand facing Green Road) which joins that of the defendant's and which in turn opens to the main drain of Green Road — not to that drain alongside the driveway. This drain on the right side of the plaintiffs' house can be seen in the photographs marked 12(A)–(C) of exh D2. There are complaints of rubbish being thrown purposely by the plaintiffs into that drain which caused blockages but which I am not inclined to give my views on as it does not help me in the resolution of the plaintiffs' claim. However the drainage of the plaintiffs' house is a relevant factor in my consideration of the counterclaim of the defendant.

THE CENTRAL SEWAGE SYSTEM

[13] The defendant called one Vincent Liew Yun Khan ('DW3') as her third witness. He was at that time an engineer with Jurutera Jasa Sdn Bhd cum Designer & Project Co-ordinator for the Kuching's centralised sewage system. According to him and the drawing of the system exhibited to his witness statement, the sewage of the plaintiffs' house is drained into and is connected to the main sewage line at Persiaran Cooke or Cooke's Drive, not Green Road. This evidence of his is of course authoritative and unchallenged and it brings me to the counterclaim of the defendant which at para 18 thereof pleaded that the access road is no longer necessary as the plaintiffs can access their land via Cooke's Drive.

[14] At the same visit on 7 September 2015, we also went up to Cooke's Drive which opens up to the backyard of the plaintiffs' house. Meaning to say it is accessible through the said drive if an opening is made to the back fence behind the plaintiffs' house. Besides Cooke Drive is also a small playground and a small car park. Photographs of the back of the plaintiffs' house and part of that car park can be seen in photographs 6(A) and (B) of exh D2. What can also be seen in both photographs, though partly hidden by overgrown bushes but which I could clearly see during the visit is a DBKU meter box which according to both PW3 and PW4 would hinder any access to their house from Cookes Drive. With respect, I do not see that is so — from the two photographs also it can be seen that such an access is possible and which the plaintiffs would have to do in the event that the defendant succeeds in

extinguishing the easement granted to them. That power of extinguishment lies with the one who granted it in the first place ie the Superintendent of Land and Survey Kuching. The plaintiffs' first witness, the Registrar of Land and Survey herself ie Puan Dayang Rodziah bt Awang Shuib ('PW1') agreed that the easement can be extinguished if all parties agree to it and if there is an alternative public access to it. Clearly therefore the defendant is at liberty to make the necessary application before the said officer and she does not need me to make a declaration, as prayed in prayer 21(i) of her counterclaim, that she can do so. On this issue I was referred, by Ms Chan Siew Yan to the case of the Court of Appeal in the *The State Government of Sarawak & Ors v Teo Soo Chuan* [2014] 4 MLJ 114 which appeal incidentally originated from my decision on the extinguishment of an easement. The Court of Appeal overturned my decision to extinguish the easement in the said case but said at para 14 of the judgment held that the court can make an order of determination or extinguishment of an easement provided all necessary and interested parties are before the court. However, I do not see much relevance of the ratio in the cited case to the said declaratory prayer sought by the defendant because the right to make an application to the said officer of Land and Survey Department is inherent in the servient tenement ie the defendant but whether the application will meet with success is another matter altogether. Without any intention to goad the parties to a further legal dispute, I would just have to add that if their application fails, the defendant can, going by the cited case as well as another one cited by Ms Chan Siew Yan, ie *Taat Yik Plantations Sdn Bhd v Pentadbir Tanah Hilir Perak & Ors* [2001] 5 MLJ 736 always file their own claim against the said officer or the relevant government agency and even the plaintiffs for the easement to be extinguished although I sincerely hope that in the spirit of neighbourliness, or what is left of it, the defendant would not have to do so.

[15] As I mentioned earlier water and effluent from the plaintiffs' house flows into the defendant's drain before it is discharged into the main drain of Green Road and I could see from my visit there and from photographs marked 12(A)–12(C) of exh D2 that it was clogged at the point of entry. However, since it is the plaintiffs or whoever resides there are the ones who need to discharge the effluent/water into the drain which joins that of the defendant's, it is to their advantage to keep their side of the drain clear from any rubbish otherwise their own drain would also be clogged. I therefore see no necessity for an order that the plaintiffs be restrained from throwing waste materials into the drain as doing so would only be to their own detriment. Neither am I moved to grant her prayer for damages for I do not see evidence of any loss except that of goodwill caused by the plaintiffs' construction of the new fence. What I am willing and is prepared to do is to grant a declaration as per her prayer 21(ii) that the new fence to her house be maintained given the futility of the plaintiffs' claim as decided earlier. As for costs, given the dismissal of the claim and largely, that of the counterclaim, I order each party to bear their own costs.

Claim and counterclaim dismissed with each party to bear its own costs.

Reported by Kohila Nesan